Supreme Court, U.S.
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No. _____

In The

Supreme Court of The United States

October Term, 1996

OSCAR SALINAS,

Petitioner,

v.

UNIVERSITY OF TEXAS-PAN AMERICAN, GLORIA LIND, DR. ERNEST BACA, DR. LEE HAMILTON, CAROL RAUSCH BRADEN, ANTONIO VILLALOBOS, DR. RUDOLPH GOMEZ, IRMA RODRIGUEZ, NORMA PEREZ, DR. GARY MOUNCE, and DR. VALERIE JAMES-ALDRIDGE,

Respondents,

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

Petition For A Writ Of Certiorari

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85 pp

QUESTIONS PRESENTED FOR REVIEW

In *Paul v. Davis*, 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405, *rehearing denied*, 425 U.S. 985, 96 S.Ct. 2194, 48 L.Ed.2d 811 (1976), this Court ruled that in order to state a 42 U.S.C. Section 1983 claim for defamation, a plaintiff also had to claim a deprivation of liberty or property prohibited by state law. Also, by definition, a Section 1983 claim must assert a constitutional violation. The questions presented are:

1. Whether breaking a state law against Tampering with a Governmental Record by knowingly placing false charges of sexual harassment in a permanent personnel file, an act which is allegedly the key feature of a program of harassment, satisfies the plus requirement of a Section 1983 defamation claim and thus inflicts a legally cognizable injury in fact which gives the libeled party standing to sue in federal court.

2. Whether an individual accused of sexual harassment is entitled to a predeprivation evidentiary hearing.

3. Whether postdeprivation standards of due process in sexual harassment cases should be consistent with predeprivation standards calling for an evidentiary hearing or be determined by subjective considerations of expeditious adjudication specified in *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976).

LIST OF PARTIES

Petitioner Oscar Salinas, plaintiff below, filed suit on his own behalf. Defendants are The University of Texas-Pan American, Gloria Lind, Dr. Ernest Baca, Dr. Lee Hamilton, Carol Rausch Braden, Antonio Villalobos, Dr. Rudolph Gomez, Irma Rodriguez, Norma Perez, Dr. Gary Mounce, and Dr. Valerie James-Aldridge.

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DR. VALERIE JAMES-ALDRIDGE
Respondents,

PETITION FOR A WRIT OF CERTIORARI

Oscar Salinas respectfully petitions for a writ of certiorari to review the opinion of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals, Fifth Circuit (Appendix [App.] 1a) is unpublished. Findings of Fact and Conclusions of Law by the United States District Court for the Southern District of Texas, McAllen Division (App. 5a) are also unpublished.

JURISDICTION

The United States Court of Appeals, Fifth Circuit issued its opinion on May 20, 1996. Oscar Salinas filed a Petition for Rehearing on June 5, 1996, but it was untimely. He filed a Motion to File a Petition for Rehearing Out of Time on June 18, 1996. The Motion to File Out of Time was granted July 5, 1996, and the Petition for Rehearing was denied July 5, 1996 (App. 15a). This Court has jurisdiction to review the judgment of a Court of Appeals pursuant to 28 U.S.C. Section 1254(1).

STATUTORY PROVISIONS INVOLVED

U. S. Constitution — 14th Amendment (in relevant part)

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. Section 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory, subjects or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or

immunities secured by the Constitution and laws shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress.

Vernon's Texas Codes Annotated (V.T.C.A.), Penal Code, Section 37.10 (a) — Tampering with Governmental Record (in relevant part)

A person commits an offense if he: (1) knowingly makes a false entry in, or false alteration of, a governmental record; (2) makes, presents, or uses any record, document, or thing with knowledge of its falsity and with intent that it be taken as a genuine governmental record; . . .

V.T.C.A., Penal Code, Section 39.02 (a) — Official Oppression
A public servant acting under color of his office or employment commits an offense if he: (1) intentionally subjects another to mistreatment... ; (2) intentionally denies or impedes another in the exercise or enjoyment of any right, privilege, power, or immunity knowing his conduct is unlawful.

STATEMENT OF THE CASE

THE FEDERAL QUESTION:

This petition arises out of the University of Texas-Pan American's placing a reprimand in Petitioner's permanent file portraying him as a dangerous, mentally ill sexual harasser and prohibiting him from conducting business directly with the university's Travel Office. Petitioner filed suit on August 1, 1994 under 28 U.S.C. Sections 1331, 1343 (3), 2201, and 2202 and 42 U.S.C. Section 1983. Issues upon which federal jurisdiction is based are: 1) whether defamation through Tampering with

a Government Record which is claimed to be the key feature of a program of harassment amounts to defamation plus and thus inflicts a legally cognizable injury in fact which gives one standing to sue in federal courts; 2) whether an alleged sexual harasser is entitled to an evidentiary hearing; and 3) if so, whether such a hearing is satisfied by a postdeprivation grievance procedure that allows only appeals to officials who allegedly conspired to obstruct an investigation in the first place.

Upon reviewing the record, the Magistrate Judge found that there were no facts rising to the level of a Section 1983 claim (App. 7a) and granted Defendants' 12 (b) (6) Motion to Dismiss. Upon reviewing the record and appeal briefs, the United States Court of Appeals, Fifth Circuit, found "no reversible error" (App. 2a).

FACTS IN THE PLEADINGS:

As a Section 1983 claim must be pleaded with particularity, the facts are stated here as in the pleadings:

On August 4, 1993, Plaintiff, a lecturer in the English Department of the University of Texas-Pan American, was formally accused of sexual harassment by Defendant Gloria Lind, an employee in the university's Travel Office (AC [Amended Complaint], pghs 5, 55-71). Plaintiff claims her complaint of sexual harassment was the key element of a plan she had concocted to ruin his career by having him fired from his university position (AC, pghs 4, 161).

A few years after Plaintiff first met Mrs. Lind, he called her about travel arrangements and she began to flirt with him over the phone (AC, pgh 19). After getting Plaintiff's attention, she managed, with the aid of

Travel or Purchasing Department staff, to get him to ask her out to lunch a few times (AC, pghs 20-44). However, on July 9, 1992, Defendants Carol Rausch Braden, Assistant to the President, and Antonio Villalobos, Personnel Director, called Plaintiff in to say that Mrs. Lind had told her supervisor about Plaintiff's attention because, according to Defendant Mr. Villalobos, she "thought she [the supervisor] should know" (AC, pghs 46, 58). Plaintiff was told by Defendants Ms. Rausch Braden and Mr. Villalobos that Mrs. Lind had said that she did not want to discuss personal matters with Plaintiff but that he could still call or go into her office to discuss business (AC, pgh 46). It was understood at this meeting that Plaintiff had done nothing more "offensive" than ask Mrs. Lind out to lunch.

After the prohibition against discussing anything personal with Mrs. Lind was handed down to Plaintiff, Mrs. Lind began the next phase of her plan which was to break into his apartment and leave signs that she had been there, such as dog-earing the page in the phone book where her surname appears (AC, pgh 48). Plaintiff complained of the break-ins via a note to the apartment complex manager, Defendant Norma Perez, who, despite being accused of being an accomplice to breaking and entering and invasion of privacy, never approached Plaintiff to discuss the accusation, though later on a couple of occasions she did admit to having read the letter (AC, pghs 51, 157-160). Eventually, Mrs. Lind stole a credit card — though she did not charge anything on it — and a handkerchief (AC, pghs 50, 52). Not wanting to get her into any trouble she could not get out of, he went to her office to ask her to stop the harassment. He also called her a "vamp" but not angrily, just matter-of-factly, thinking she might be content with his admission that she had him confused (AC, pgh 53). He simply saw no reason why she would

want to hurt him.

However, the very next day, August 4, she filed her formal complaint alleging sexual harassment, a complaint which included a number of fabricated facts such as that he had been prohibited from having any contact at all with her after he had told her he admired her and commented on her "luscious lips" [genitalia] which "he would like to touch" (AC, pghs 55-71). Her claim that he had been prohibited from having any contact with her has since been established as false by Defendants Dr. Ernest Baca, then Dean of the School of Arts and Sciences, and Dr. Lee Hamilton, Chairman of the English Department, who have said, respectively, that Plaintiff had been told he could have business contact with Mrs. Lind and call her (AC, pghs 98-104). After Mrs. Lind filed her complaint, Dr. Baca and Dr. Hamilton together met with Plaintiff on August 23 and September 30, 1993 (AC, pgh 79). However, when Plaintiff asked them to put the original prohibition in writing so that he could defend himself by pointing to the fact that he had been told he could go into her office on business (and thus had never been so offensive as to warrant prohibition of any contact), they refused to do so (AC, pghs 123-125), though Dr. Hamilton did say that Mr. Rausch Braden had confirmed Plaintiff's version of the prohibition (AC, pgh 96).

That no one would make the original prohibition explicit though everyone was aware that Mrs. Lind had lied about it is very telling. It is reasonable to infer that Mrs. Lind knew nobody would contradict her version of Plaintiff's conduct, otherwise she would not have risked having the misrepresentation exposed by Defendants Ms. Rausch Braden and Mr. Villalobos who had imposed the original prohibition. Evidently, she was able to convince high level university administrators to join the conspiracy

to frustrate plaintiff into acting irrationally and losing his job (AC, pghs 86-114).

On August 23 and September 30, in meetings following Mrs. Lind's complaint, Dr. Baca and Dr. Hamilton tried to convince Plaintiff that he needed counseling, yet they insisted that they did not think Plaintiff had committed sexual harassment (AC, pghs 79-82). Dr. Baca admitted in a reply to a grievance letter from Plaintiff that he never even mentioned Mrs. Lind's allegations to Plaintiff (AC, pghs 78, 127-131; App. 40a). Yet Dr. Baca proceeded to write a memo to Vice President for Academic Affairs, Dr. Rudolph Gomez, and a letter to be placed in Plaintiff's permanent file, which, together with Mrs. Lind's allegations, create the impression that Plaintiff is a sex criminal ("luscious lips" + "overcome by desire" + "immediately initiate dismissal proceedings" + "Mrs. Lind has the right to a good working environment, and Mr. Salinas' actions have created an atmosphere which is contrary to this expectation." + "you are not to contact Gloria Lind . . . at . . . her . . . home address" + "I am again suggesting you consider obtaining professional counseling") (AC, pghs 5, 72-80). The reprimand included a prohibition against Plaintiff's conducting his own business directly through the Travel Office (AC, pgh 131).

Following the placement of the reprimand in Plaintiff's permanent file, Mrs. Lind stepped up the harassment. She had students convey signs of impending harassment, and with the help of English department staff, especially secretary Defendant Irma Rodriguez, she stole or had someone steal papers from his files and a book from his office (AC, pghs 147-151). Eventually, when she could not get Plaintiff to lose his temper through passive-aggressive annoyances, she had one of his students

put a nail through one of his tires (AC, pgh 155). At this point, Plaintiff took action by recording a conversation with his apartment complex manager, Defendant Mrs. Perez, during which he asked her for the letter he had delivered to her asking her and Mrs. Lind to stop breaking into his apartment. She admitted having read the letter, but could not explain why she had never approached him to discuss or deny such a serious accusation (AC, pghs 157-160). Plaintiff played the recording for Defendants Dr. Baca and Dr. Hamilton and asked that they remove the letter of reprimand from his files based on the circumstantial evidence of her having broken into his apartment, but they would not (not in pleadings). Plaintiff then asked two fellow members of the Texas Faculty Association, Defendants Dr. Gary Mounce and Dr. Valerie James-Aldridge, to intercede with the administration (AC, pghs 110-113). Though aware of the falsity of the sexual harassment charge, they did not care that the university would not specify the original prohibition, so Plaintiff regards them as participants in the conspiracy.

Unable to shake the letter loose informally, Plaintiff went through the university's formal grievance procedure in timely fashion and wrote to Ms. Rausch Braden (AC, pghs 89-93), Mr. Villalobos (AC, pghs 89-90), Dr. Hamilton (AC, pgh 97-100), Dr. Baca (AC, pghs 78, 83, 104-106), and Dr. Gomez (AC, pghs 94-95, 107-109), but no one would specify the elements of Plaintiff's offense. According to the grievance policy (App. 25a), the decision of the appropriate vice president (in this case, VPAA Dr. Gomez) is final. The complainant is not afforded an opportunity for a hearing before an unbiased tribunal.

Thus it is that Plaintiff has had to endure harassment,

invasion of privacy, theft, vandalism, tampering with government records, and being branded a sex criminal, all because he is powerless to defend himself in the face of the university's refusal to investigate the charge of sexual harassment, to tell him what rule he broke in the first place, or to grant him an unbiased hearing. Having exhausted administrative remedies, Plaintiff filed suit in federal court.

REASONS FOR GRANTING THE PETITION

QUESTION 1:
If sexual harassment is a serious offense, then it follows logically that a false accusation of sexual harassment is equally serious and should be considered to inflict an injury in fact.

The district court ruled and the court of appeals concurred that Plaintiff's statement of a cause of action is entirely "hypothetical and speculative" - that is, that Petitioner has not suffered an injury in fact and thus does not have standing to sue (App.10a). Finding that Petitioner has only been "continuing to assert that he has been victimized," (App. 9a) the lower courts feel, apparently, that enduring a program of harassment the central feature of which is malicious defamation in a government record does not make for a serious enough injury in fact to give one standing to sue in federal court. However, to someone who has been formally labeled a sexual harasser, it is clear that a deliberately false accusation plays off of a newly sensitized cultural consciousness of sexual harassment as iniquitous to make one a target of reverse victimization.

This Court may consider it obvious that anyone is a victim who has had defamatory statements placed in a

government record by officials aware of the falsity of the statements. Indeed, the obviousness of such an abuse of power is reflected in state laws against official oppression and tampering with government records. Moreover, such deliberate libel rises to the level of "actual malice" standards set by this Court and Texas courts. *New York Times v. Sullivan,* 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964); *Carr v. Brasher,* 776 S.W.2d 567, 571 (Tex. 1989). It is clear that legally speaking Petitioner has stated a claim of defamation plus tantamount to a deprivation of liberty as defined by *Paul v. Davis, supra.* Yet to the lower courts it is not so clear. And their only argument stated in any opinion is that Petitioner has not been injured. But the instant case involves allegations of sexual harassment, a type of abuse that has been legally recognized as a social fact only relatively recently. In moving toward recognition of the fact of sexual ha-rassment, the focus, of course, has been on the plight of the victims of such harassment. It appears, however, that as feelings of the sexually harassed are seen with increased sensitivity, the plight of the accused can be glossed over, such that an accused may be seen as guilty until proven innocent.

False accusations of sexual harassment are a particularly injurious reality. According to the Equal Employment Opportunity Commission (EEOC), 15,549 sexual harassment complaints were filed during fiscal year 1995. Of these, 30.4 percent were found to have been filed without reasonable cause. Of course, some claims may have been valid but simply too hard to corroborate. But this is still a disturbingly large percentage. It is easy to imagine that there are some false positives among those found guilty of sexual harassment, especially at place of employment where employers tend to structure procedural protocol primarily to be expedient rather than fair, as in the instant case (this point is developed in Reasons infra).

Moreover, injuries have been inflicted not as an inadvertent effect of expedient process but directly as a result of discriminatory motive, as in the case of one plaintiff who was terminated ostensibly because of his having commited sexual harassment but actually because of his national origin. *Valdez v. Church's Fried Chicken, Inc.*, 683 F. Supp. 596 (W.D. Tex. 1988).

Unfortunately, false accusations of sexual harassment are a reality that has not yet risen to public consciousness as a social fact. This Court can do much to stop reverse victimization through manipulation of anti-sexual harassment sentiment by officially recognizing that deliberately creating a false record of one as a dangerous sexual harasser inflicts an injury in fact. In the instant case, the seriousness of the injury to reputation is evident from the fact that the National Education Association's Code of Ethics of the Education Profession states that an educator "shall not assist entry into the profession of a person known to be unqualified in respect to character, education, or other relevant attribute." Given that the backgrounds of prospective students, grantees, or employees are frequently investigated, it is clear that Petitioner's career opportunities have been severely compromised. In addition, the courts should not simply assume that Petitioner is lying about the program of harassment he has been subjected to which has even included theft from his office.

QUESTION 2:

A. To refuse to investigate meaningfully claims of innocence to charges of sexual harassment is essentially to turn sexual harassment law into a tool of harassment, a bad faith legal manipulation which violates the rights of the accused and in so doing trivializes true complaints of sexual harassment.

The bad faith application of sexual harassment law is facilitated by the fact that the law is vague on the rights of the accused. In the words of one district court, *Ashway v. Ferrellgas, Inc.*, 59 FEP Cases 375, 377 (Ariz. 1989):

> [T] here is apparently no legal authority that specifically articulates a duty to the accused that requires an employer to conduct an adequate investigation before making a decision to terminate based on allegations of sexual harassment.

This vagueness, in turn, is due to the fact that sexual harassment policies and procedures are supposed to "encourage victims of harassment to come forward" [*Meritor Savings Bank, Inc. v. Vinson*, 477 U.S. 57, 106 S.Ct. 2399, 2408, 91 L.Ed.2d 49 (1986)], and some victims would no doubt hesitate to complain if they expected a formal hearing that would require them to forfeit confidentiality. Thus, though it is understood that sexual harassment complaints should trigger appropriate corrective action, institutions may differ as to what procedures they consider "appropriate."

A good example of especially vague and inappropriate procedures is the sexual harassment guidelines of the University of Texas-Pan American (App.17a). An administrative vice-president overseeing the division of the university in which the harassment allegedly occurred is responsible for both investigating and making the final determination of guilt. Obviously, if the administrator is antagonistic toward the accused or the complainant, he or she can investigate selectively with the intent of slanting evidence to support a biased judgment. Obviously, vesting authority in one individual to be investigator, judge, and jury greatly facilitates abuse of office.

In the instant case, Petitioner has been found guilty of being a deranged sexual harasser simply by virtue of being charged. Rather than investigate, the university was careful to obstruct due process. During the predeprivation phase of formal proceedings before the damning reprimand was put in his file, Petitioner asked the university to at least put in writing the prohibition he was supposed to have transgressed. The university did admit the falsity of Mrs. Lind's version of the prohibition (App. 38a, 40a) — that is, that Petitioner had been prohibited from having any contact at all with her (App. 33a), which, of course, gave the impression that Petitioner really had been guilty of harassment — but it would not make the actual prohibition explicit. The university could have taken testimony from people in Mrs. Lind's office who Petitioner claims knew about Mrs. Lind's phone games with him, but it did not. Petitioner told the university that a secretary in the English Department, Defendant Irma Rodriguez, was also involved in the phone games, but if the university questioned her (App. 44a), it did so during the grievance process after placing the reprimand in his file and after Ms. Rodriguez had already gone too far in harassing Petitioner by going through his files such that she would not be willing to tell the truth. After Defendant Mrs. Lind lodged her complaint on August 4, many faculty, staff, and students were made aware of its falsity, and Petitioner could have called anyone of them as witnesses but he was never given the opportunity to do so. The university claims that it checked with Defendant Norma Perez, his apartment complex manager, about Petitioner's claims of her allowing Mrs. Lind into his apartment (App. 44a), but Mrs. Perez's and the university's accounts of the interview differ. Referring to a letter Petitioner wrote to Mrs. Perez and Mrs. Lind telling them not to invade his privacy, the university claims Mrs. Perez told university police she had received

a letter addressed to a "Gloria" but had thrown it away. In her pleadings, Mrs. Perez denies having reported to university police anything about receiving such a letter (App. 45a). Petitioner seriously doubts the university ever questioned Mrs. Perez. Finally, the investigator and adjudicator, Defendant Dr. Baca, has admitted that he never even discussed Mrs. Lind's allegations with Petitioner before writing the reprimand (App. 40a).

A fair hearing may not have to be oral and public, but it does have to be evidentiary; that is, it does have to provide for methodical gathering of facts, cross-examinations of witnesses, and objective interpretations of the body of evidence. To deliberately fail to investigate claims of innocence to sexual harassment charges is to distort the purpose of sexual harassment law and to use it as a tool of harassment. In the instant case, Petitioner claims that harassment has been so outrageous as to include theft from his office and vandalism to his car. By themselves, that is, taken apart from any evidence of university bad faith, these claims may be regarded as purely conclusory allegations. However, they must be given legal weight because of the university's bad faith suppression of facts. Thus, because bad faith refusal to investigate claims of innocence to sexual harassment charges is essentially the key to a program of harassment, such bad faith mistreatment should be regarded not just as a denial of due process but also active victimization within the meaning of the Texas statute against Official Oppression. Thus, enforcing discipline without a good faith investigation into sexual harassment disputes should be regarded as sufficient basis for a Section 1983 claim of defamation plus.

B. To hold that an alleged sexual harasser does not have to be allowed to call witnesses reflects such an

overevaluation of the feelings of the complainant that the very nature of law itself is upended so as to render it useless as an instrument of justice.

After having a reprimand placed in his permanent file, Petitioner went through the university's grievance procedure, but no administrator would make explicit the elements of Petitioner's offense (App. J, K, L, M, N). But this is not surprising because they were, after all, being asked to provide self-incriminating evidence of violations of the penal code. Unfortunately, Petitioner could not call witnesses to support his claims of innocence because an unbiased hearing is against university policy (App. 25a). Amazingly, the district court and court of appeals ruled that Petitioner need not have had a chance to call witnesses.

In fact, the lower courts placed so much legal weight on Mrs. Lind's version of the truth (which had been contradicted by university officials) that they were even content to let Defendants' attorney Mr. McGuffey lie at the second hearing in saying that Petitioner had been denied a hearing because he had not complied with the university grievance policy, which by implication provides for an unbiased hearing (App. 49a). Apparently, because Petitioner had not attached the university grievance policy to his Amended Complaint, Mr. McGuffey thought Petitioner would not have it with him at the hearing. But Petitioner did have the policy in hand, and grievance letters which were on the record as exhibits made it clear that Petitioner had complied with it through all of the procedure's levels (App. 25a), which do not include an opportunity for an unbiased hearing. However, even though Defendants misrepresented a key fact regarding due process, neither the district court nor the court of appeals could be persuaded that the university might have

something to hide.

Of course, in defining sexual harassment in terms of effects as they are subjectively reported, EEOC guidelines are intended to provide a legal foundation for determining guilt in terms of subjective experiences rather than observed causes. The legal primacy of effects is reflected in the EEOC's assertion that "if the investigation exhausts all possibilities for obtaining corrobotive evidence, the Commission may make a cause finding based solely on a reasoned decision to credit the charging party's testimony." EEOC Notice 915-050, *Policy Guidelines on Current -Issues of Sexual Harassment,* 3/19/90. This is not to say that causes are insignificant, only that where sexual harassment is concerned, the force of the causal insult becomes evident through the victim's reports of feelings. Sexual harassment is essentially defined as an "intentional assault on an individuals innermost privacy." *Bundy v. Jackson,* 641 F.2d 934, 945 (D.C. Cir. 1981). Nevertheless, there has to be an objectively perceived match between magnitude of insult and degree of offense taken. Emotions are invisible, and thus can only be inferred from behavior, which, of course, may serve to hide or misrepresent true feelings. Thus, though interiors must be acknowledged and protected by legal theories of fairness, the law as an instrument of order must place reason above feelings. And reason demands that feelings of victimization not be accorded any legal weight without empirical evidence of abuse. In fact, the moral necessity of fact finding is quite obvious; it does not take a fiercely logical mind to understand that basing determinations of guilt on the word of the accuser facilitates false accusations.

Yet, in the instant case, Petitioner has been found guilty of being a deranged sexual harasser simply by vir-

tue of being accused. This could only happen in a culture that sees justice as the outcome of a competition. And such a simplistic view of sexual harassment law, in turn, reflects a lack of understanding of *why* the courts have come to the aid of sexual harassment victims, which is because of their disadvantaged status in vertical relationships. With *Meritor,* this Court conveyed the essential truth that dependent people have rights and people with power (especially the power of a dominant sex role) have responsibilities.

But people have difficulty understanding that dependencies and responsibilities are defined in relation to each other. Of course, from an historical perspective, this is understandable. The terms "rights" and "responsibilities" have been abstracted from sympathies stirred during particular conflicts such as between parent and child or master and slave. As sympathies broaden within a culture over time, the moral principles both informed by and feeding moral emotion also gain in organizing power. Sexual harassment law is an expression of sympathies that have extended to imagined interiors, and now that people must respect others' feelings, they must consider seriously that a right is not a particular interest group's entitlement (a circular definition) but rather an entitlement tied to common core dependencies. But a refinement of principle that prescribes an expansion of moral identity to universal dimensions can be expected to be quite difficult to understand. In fact, those whose reason is overtaxed by raised standards of responsibility can be expected to interpret the legal valuation of feelings as validation of their own tendencies to reduce law to self-indulgent power politics.

Certainly, in the instant case, state officials who think it fair to punish someone for sexual harassment without

even giving him a chance to call witnesses demonstrate a rather retrograde understanding of law. Plaintiff has essentially been caught in a moral consciousness gap between a raised standard of right and a lag in understanding of the standard. This Court should move toward closing this gap by making the point in the instant case that as laws are refined to protect deeper dependencies and thus more general categories of rights, they also impose a duty on the courts and the populace to maintain the connection between the local and the universal through logical consistency of judgments.

QUESTION 3:
A lack of logical consistency between lower court decisions as to what principle should govern whether alleged sexual harassers are entitled to an evidentiary hearing indicates that the Supreme Court needs to provide guidance on this issue.

On the one hand, institutions are required by sexual harassment law to encourage employees to come forward with complaints of sexual harassment, but on the other, they must also he careful not to sanction false accusations. It is the role of the judiciary to determine if an employer has struck a balance between these two legal and moral obligations. A fair judgment entails a rigorous analysis of facts according to principles of law. Sometimes, however, the logical distance between precepts of case law may be too great to facilitate a synthesis of fact and principle. For example, in sexual harassment cases, the rights of the complainant are interpreted according to EEOC guidelines which require attention to interiors, but the rights of the accused who must file a lawsuit are interpreted much more subjectively by the courts according to the guidelines set out in *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976), which call

for matching quality of procedural due process to the need to balance private and public concerns. Basically, whereas the plight of the sexually harassed is held so uniquely oppressive as to merit close scrutiny in every case, the plight of the alleged harasser falls in the general class of discrimination cases that may or may not call for evidentiary procedures, depending less on the truth or falsity of allegations than on the legal definitions of liberty or property that are held to apply.

For example, in a recent discrimination case, *Gregory v. Hunt,* 24 F.3d 781 (6th Cir. 1994), the plaintiff Gregory, a security officer at a university, was initially denied a hearing regarding his discharge from the university for failure to follow policies and procedures. With the help of counsel, he was able to obtain an informal hearing at which he was first informed of the evidence against him. Gregory was not allowed to present arguments to an unbiased tribunal, and the appeals court ruled that his opportunity to state his case was sufficient due process. As the university's evidence is not mentioned in the published report, it is impossible to form an opinion as to the merits of Gregory's case, but the merits do not really matter legally in light of the court's ruling that Gregory was not entitled to unbiased interpretations of the evidence anyway.

The fact that the evidence was not presented to Gregory until the hearing and that the alleged transgressions of policy were not egregious enough to be published suggests that the administration may have acted arbitrarily and capriciously. One gets the sense in *Gregory* that major ethical concerns lie unresolved beneath surface forms of justice. But strictly speaking, Gregory's deeper interests need not be of primary concern to the courts, at least not to the extent that the rights of the sexually harassed must

be protected. In due process cases, the interests of the individual must be balanced against the interests of the majority. *Paul v. Davis, supra,* makes it quite clear that the state may hurt an individual, just not in such a way as to deprive him of immediately "tangible interests" recognized by state law. And even where tangible interests such as employment are concerned, the law sets limits as to how much process is due. For example, in *Cleveland Board of Education v. Loudermill,* 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985), Loudermill, a security guard, was dismissed without being given the opportunity to respond to a dishonesty charge. This Court ruled that he was entitled to a pretermination opportunity to respond to charges, but not to a full evidentiary hearing (which, however, was available post-termination according to Ohio statute). *Loudermill and Gregory* are consistent with major due process cases that have denied the appropriateness of evidentiary hearings in favor of giving officials the benefit of the ethical doubt. *Board of Regents v. Roth,* 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972); *Arnett v. Kennedy,* 416 U.S. 134, 94 S.Ct. 1633, 40 L.Ed.2d 15 (1974); *Bishop v. Wood,* 426 U.S. 341, 96 S.Ct. 2074, 48 L.Ed.2d 684 (1976). *Mathews v. Eldridge, supra,* makes it quite clear that justice is not justice if it is too unwieldy relative to the type of interest at risk.

At the beginning of the first hearing on Defendants' 12 (b) (6) Motion to Dismiss, the Magistrate Judge emphatically noted that a complaint about a letter of reprimand in a personnel file does not rise to the level of a federal claim (App. 49a). Given the subject matter of the letter, this is the same as to say that state officials may falsely accuse one of being a deranged sexual harasser with impunity. Moreover, given Petitioner's claims of being a victim of a program of harassment the key fea-

ture of which is the defamatory reprimand, the court's ruling is tantamount to saying that the State may harass a citizen. To a layman such as Petitioner, such a judicial decree seems morally incomprehensible, but in fact, federal courts do not have to require in depth factfinding in defamation cases because according to *Paul* federal jurisdiction does not turn on the issue of truth or falsity. It turns, rather, on the issue of expeditiousness. In the instant case, Petitioner, in addition to receiving a reprimand, was prohibited from conducting business with the Travel Office except through his department head (App. 30a). However, even if such a restriction were to be considered a harassing deprivation of a tangible liberty interest, thus fulfilling the plus requirement of a Section 1983 defamation claim, the court would still have to determine if the deprivation occurred without due process, a determination involving a balancing of public and private interests. In the instant case, the district court, following the lead of precedent which does not regard reputation as a substantive liberty interest and apparently regarding a specific employment restriction as a mere inconvenience and totally disregarding all claims of harassment, decided that Petitioner's being allowed to respond to allegations of sexual harassment and to write grievance letters was sufficient due process; in other words, it decided that Petitioner was not entitled to an evidentiary hearing.

This is a very strange finding, for it would seem that if an alleged sexual harasser is not allowed to call witnesses at the predeprivation stage of proceedings, then he should be allowed a postdeprivation evidentiary hearing, if not within place of employment then certainly in the courts. But this is the logic of morality, which is by definition concerned with depths. Historically speaking, moral truth is not the same as legal truth (see, 0. W.

Holmes, *The Path of the Law,* 10 Harvard Law Review 457 [1897]), the form of which may actually subvert or constrain attempts to get to the heart of justice. In the instant case, the district court exercised a prerogative to regard Petitioner's opportunity to write grievance letters as evidence of the university's good faith, as though the image of procedural due process is sufficient definition of fairness. In fact, the court was adamant that Petitioner had no substantive grievance, so much so that at the first hearing it would not allow Plaintiff to be specific about the harassment he is claiming (App. 47a). Both legally and morally, such indifference to and rejection of facts is a far cry from the focused attention that is automatically given to complainants of sexual harassment who are actually encouraged to come forward with details of victimization.

Of course, some courts do operate from the premise that if an alleged sexual harasser should be allowed a predeprivation evidentiary hearing, then postdeprivation procedures, especially those in the courts, should not dilute such a right by applying a legal theory that balances public and private interests for the sake of expeditiousness. A case in point is *Starishevsky v. Hofstra University,* 612 N.Y.S. 794 (1994). A student accused Starishevsky, Director of the university's Counseling Center, of having kissed her at the end of a counseling session. The Affirmative Action Office, however, closed the case because there were no witnesses to the alleged incident. The complaint was reopened upon the recommendation of two administrators who reviewed the initial investigation. A hearing was held, but Starishevsky was not informed that the panel would look into more than just the alleged incident with the purpose of making a recommendation regarding his future employment. After the hearing and without Starishevsky's knowledge,

two panel members met privately with a witness who had counseled the student on how to pursue her allegation against Starishevsky. The panel found that it could not find Starishevsky guilty of sexual harassment but that based on testimony including allegations by the Director and Assistant Director of Residential Life at the university that Starishevsky had kissed them four years earlier, it was recommending termination of employment due to loss of confidence in Starishevsky's ability to conduct himself as a professional. However, the court found that as Starishevsky had not been found guilty of sexual harassment, the university could not sanction or discipline him under its sexual harassment guidelines. Moreover, the court found that the hearing had not been conducted in good faith considering the lack of notice of the broader purpose of the hearing, the inclusion of evidence that did not bear on the present incident being investigated, and Starishevsky's not being given an opportunity to cross-examine a witness.

The Starishevsky decision essentially reflects the position that "the process of eliminating sexual harassment must go forward with recognition of the rights of all involved and without the creation of new wrongs." *supra*, at 796. These are wise words, for the easiest way to corrupt a moral end is to pursue it with the mean motives and petty emotions evident in a deliberate subversion of due process. That the danger of creating new wrongs is a real concern is evident in cases like *Starishevsky* in which the humanistic principle of due process is ignored by authorities who should know better. In *Silva v. University of New Hampshire*, 888 F.Supp. 293 (D.N.H. 1994), a writing instructor was disciplined for violation of sexual harassment policy, but the district court found evidence of inadequate notice of evidence presented against the instructor and bias among university adjudi-

cators. In *Vanelli v. Reynolds High School*, 667 F.2d 773 (9th Cir. 1982), the court awarded damages to a sexual harasser who had been discharged without a pretermination hearing. In *Huff v. County of Butler*, 524 F.Supp. 751 (1981), the district court denied a 12 (b) (6) motion because the plaintiff, who alleged a forced resignation due to false charges of sexual harassment, was not allowed a hearing. Those employed "at will" are at a particular disadvantage in that they may be discharged for sexual harassment without a thorough investigation. *Lambert v. Morehouse*, 61 FEP Cases 50 (Wash. Ct. App. 1993); *Willis v. Ideal Basic Indus., Inc.*, 484 So.2d 444 (Ala. 1986). Obviously, sexual harassment law can be a handy tool for employers who want to "frame" somebody. See *Valdez, supra.*

What is especially morally problematic, however, is that there is a lack of uniformity among courts with respect to degree of significance accorded the principle of due process. For instance, a case similar to *Starishevsky* had a very different outcome. In *Snipes v. U.S. Postal Service*, 677 F.2d 375 (4th Cir. 1982), a Foreman of the Mails with a good record of employment for over 14 years was discharged for four incidents of sexual harassment or remarks even though, according to the Merit Systems Protection Board, "[t] he agency has not proven by a preponderance of the evidence that the appellant's behavior created an unpleasant working condition . . ." (at 377). The court decided that the agency's decision had not been arbitrary because the alleged incidents (which are not reported) occurred with subordinates. But the agency's own findings suggest moral equivocation. Basically, the court seems to have decided to err on the side of the employer. But, as Petitioner understands the evolution of law, American courts are supposed to protect the interests of the disadvantaged.

Sexual harassment cases can be expected to be fraught with ambiguity because of the private nature of the transactions between parties. It is all too easy for manipulative and opportunistic powers that be to exploit ambiguity by bending the law to suit their own ends. The Due Process Clause is significant because it codifies the duty of the State to be patient and humble in the face of ambiguity and equivocation. Especially when delving into individuals' "innermost privacy" (*Bundy v. Jackson, supra)* in search of evidence of victimization, courts must treat the truth as an emergent phenomenon that may never fully materialize. It is precisely in such complex contexts that courts must resist the very human temptation to collapse truth into crude, convenient isolations of blame.

In the instant case, the district court and court of appeals declared Petitioner a liar without any evidence simply because the law allows, judging by *Paul v. Davis, supra*, 424 U.S. at 710, 96 S. Ct. at 1165:

> Certainly there is no suggestion in *Roth* to indicate that a hearing would be required each time the State in its capacity as employer might be considered responsible for a statement defaming an employee who continues to be an employee.

But it is simply not fair to carve away the rights of an alleged sexual harasser just as the rights of sexual harassment victims are being expanded to include valuation of subjectivity of experience.

CONCLUSION

The legal and moral issues in this case reverberate with insistent questions about the nature of the bridge between surfaces and depths. The bridge, of course, is responsibility, but how to build it is the problem. On the surface, it would seem obvious that an individual accused of sexual harassment is entitled to an evidentiary hearing, but cases in which employers play fast and loose with due process reflect resistance to the truth of having to place organizing principles above personal preferences. This Court should grant certiorari because the crucible of law is the proper place for forging the disciplined adherence to principle that is the essence of responsibility.

Respectfully submitted by,

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Pro Se

APPENDIX A
(Filed May 20, 1996)

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 95-40646
Summary Calendar

OSCAR SALINAS,

Plaintiff-Appellant,

versus

UNIVERSITY OF TEXAS - PAN AMERICAN; GLORIA LIND, In her individual capacity; ERNEST BACA, In his individual and official capacity; LEE HAMILTON, Dr., In his individual and official capacity; CAROL RAUSCH BRADEN, In her individual and offical capacity; ANTONIO VILLALBOS, In his individual and official capacity, RUDOLPH GOMEZ, Dr., In his indiviudal and official capacity; IRMA RODRIGUEZ, In her individual and official capacity; NORMA PEREZ, In her individual and official capacity; GARY MOUNCE, Dr., In his individual and official capacity; VALERIE JAMES-ALDRIDGE, Dr., In her individual and official capacity,

Defendants-Appellees.

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Appeal from the United States District Court
for the Southern District of Texas
USDC NO. M-94-CV-139

- - - - - - - - - - - - - - -

Before GARWOOD, SMITH, and DENNIS, Circuit Judges.

PER CURIAM: *

Oscar Salinas appeals from the district court's order granting the defendants' motion to dismiss pursuant to Fed. R. Civ. P. 12 (b) (6). He argues that the district court erred in concluding that he failed to state a claim under 42 U.S.C. § 1983 and that the magistrate judge exhibited bias in favor of the defendants at the Rule 12 (b) (6) hearing. We have reviewed the record and find no reversible error. We affirm the order granting the motion to dismiss for essentially the reasons given by the district court. Salinas v. Univ. of Tex.-Pan Am., No. M-94-CV-139 (S.D. Tex. Mar. 17, 1995). We decline to review Salinas' argument concerning bias because there is no error that is clear and obvious. Highlands Ins. v. National Union Fire Ins., 27 F.3d 1027 (5th Cir. 1994) (applying the standard of United States v. Calverley, 37 F.3d 160, 162-64 (5th Cir. 1994) (en banc), cert. denied, 115 S. Ct. 1266 (1995) to civil cases), cert. denied, 115 S. Ct. 903 (1995).

AFFIRMED.

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* Pursuant to Local Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in Local Rule 47.5.4.

APPENDIX B
(Filed June 23, 1995)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

OSCAR SALINAS	*	
VS	*	CIVIL ACTION NO. M-94-139
UNIVERSITY OF TEXAS - PAN AMERICAN	*	
GLORIA LIND, in her individual & official capacity	*	
ERNEST BACA, in his individual & official capacity	*	
DR. LEE HAMILTON, in his individual & official capacity	*	
CAROL RAUSCH BRADEN, in her individual & official capacity	*	
ANTONIO VILLALOBOS, in his individual & official capacity	*	
DR. RUDOLPH GOMEZ, in his individual & official capacity	*	
IRMA RODRIGUEZ, in her individual & official capacity	*	
NORMA PEREZ, in her individual & official capacity	*	
DR. GARY MOUNCE, in his individual & official capacity	*	
DR. VALERIE JAMES-ALDRIDGE, in her individual & official capacity	*	

ORDER

Before the Court is the Magistrate Judge's Report and Recommendation on the above-referenced cause of action. After a de novo review of the entire file, it is the opinion of this Court that the Magistrate Judge's Report and Recommendation should be adopted.

It is therefore ORDERED, ADJUDGED, and DECREED that the Defendants' Motion to Dismiss be GRANTED and that Plaintiff's cause of action be DISMISSED with prejudice.

DONE at Brownsville, Texas, this 23rd, day of June, 1995.

Filemon B. Vela
United States District Judge

APPENDIX C
(Filed March 17, 1995)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

OSCAR SALINAS	*	
VS	*	CIVIL ACTION NO. M-94-139
UNIVERSITY OF TEXAS - PAN AMERICAN	*	
GLORIA LIND, in her individual & official capacity	*	
ERNEST BACA, in his individual & official capacity	*	
DR. LEE HAMILTON, in his individual & official capacity	*	
CAROL RAUSCH BRADEN, in her individual & official capacity	*	
ANTONIO VILLALOBOS, in his individual & official capacity	*	
DR. RUDOLPH GOMEZ, in his individual & official capacity	*	
IRMA RODRIGUEZ, in her individual & official capacity	*	
NORMA PEREZ, in her individual & official capacity	*	
DR. GARY MOUNCE, in his individual & official capacity	*	
DR. VALERIE JAMES-ALDRIDGE, in her individual & official capacity	*	

OSCAR SALINAS, Pro Se, 1617 Jason, #2, Edinburg, Tx 78539

Texas Attorney General (H. Clay McGuffey, Assistant Attorney General), P.O. Box 12548, Capitol Stations, Austin, Tx 78711
Attorney for Defendants except NORMA PEREZ

NORMA PEREZ, Pro Se, c / o Ash Tree Apartments, 707 S. Sugar Road, Edinburg, Tx 78539

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

Before this court is Defendants' Motion to Dismiss and Plaintiff's Opposition to same. The Honorable Filemon B. Vela, District Judge, having jurisdiction over the above-styled and numbered proceedings, has directed this Court to consider the matter and file a report and recommendation herein.

This Court has read the parties pleadings, listened to their arguments, considered the issues raised in light of the applicable law, and is of the opinion that Defendants' Motion to Dismiss should be granted. In support of the aforementioned conclusion, this Court files the following findings of fact and conclusions of law.

Findings of Fact

1. On August 1, 1994, Plaintiff, pro se, filed his Original Complaint which was styled "Plaintiff's Original Petition."

2. On or about August 23, 1994, the Office of the Attorney General for the State of Texas filed a 12 (b) 5 Motion to Dismiss on behalf of the UNIVERSITY OF TEXAS at Austin and the UNIVERSITY OF TEXAS-PAN AMERICAN, and all individual Defendants, except Defendant NORMA PEREZ. The State Defendants 12 (b) 5 Motion presented certain defenses and immunities based upon the Eleventh Amendment of the constitution of the United States and the doctrine of Sovereign Immunity.

3. On or about August 22, 1994, Defendant, NORMA PEREZ, filed her Original Answer pro se.

4. On or about October 4, 1994, Plaintiff filed his response to STATE DEFENDANTS' Motion to Dismiss, which is entitled, "Amended Brief in Opposition to Motion to Dismiss."

5. Neither "Plaintiff's Original Petition," nor Plaintiff's "Amended Brief in Opposition to Motion to Dismiss" allege factual matters sufficient to state a claim under 42 U.S.C. § 1983.

6. Neither "Plaintiff's Original Petition," nor Plaintiff's "Amended Brief in Opposition to Motion to Dismiss" allege facts which would suggest that any Defendant acted in a manner which lacked objective reasonableness.

7. On or about November 7, 1994, a hearing was held on STATE DEFENDANT'S Motion to Dismiss. In attendance were the Plaintiff, OSCAR SALINAS, and Assistant Attorney General, H. Clay McGuffey representing the STATE DEFENDANTS. At the hearing, it was explained to the Plaintiff that his pleading

failed to present a claim or cause of action upon which the Court could fashion relief, and Plaintiff was ordered to replead in a more concise and specific manner by December 7, 1994. The advantages of securing the services of an attorney were discussed with the Plaintiff. Also set were a January 7, 1995, deadline for STATE DEFENDANTS' response and a subsequent hearing date of February 7, 1995.

8. On December 6, 1994, Plaintiff filed a pleading entitled "Plaintiff's Amended Complaint." On January 7, 1995, STATE DEFENDANTS filed their Supplemental Motion Dismiss in Response to Plaintiff's Amended Complain

9. "Plaintiff's Amended Complaint" alleged no additional factual matters to present anything other than what indicated on the face of his Original Complaint. "Plaintiff's Amended Complaint" provided no additional factual matters that could defeat "Defendants' Motion to Dismiss."

10. "Plaintiff's Amended Complaint" alleged no additional factual matters stating a claim under 42 U.S.C. § 1983.

11. "Plaintiff's Amended Complaint" alleged no additional facts which would suggest that any Defendant acted in a manner which lacked objective reasonableness.

12. On February 7, 1995, this Court held a second hearing on STATE DEFENDANTS' Motion to Dismiss. In attendance were the Plaintiff, OSCAR SALINAS, pro se. Also in attendance was Assistant Attorney General, H. Clay McGuffey, representing the STATE

DEFENDANTS.

13. Neither "Plaintiff's Original Petition," nor "Plaintiff's Amended Complaint" state a claim upon which relief can be granted against any Defendant.

14. "Plaintiff's Original Petition" and "Plaintiff's Amended Complaint" contain no factual allegations that would support any of the causes of action plead. Plaintiff continues to assert that he has been victimized. However, such naked assertions are insufficient to support a claim of constitutional violation. Despite Plaintiff's subjective perception of having been a victim of an unfair proceedings, this Court is compelled to conclude that it lacks jurisdiction to further review this matter.

15. Federal courts are courts of limited jurisdiction. In the case at hand, jurisdiction is not present because the action is between citizens of the same state and presents no question arising under the Constitution or laws of the United States, or otherwise within the jurisdiction of the United States Federal District Courts.

Conclusions of Law

1. In order for a case to be justiciable, a plaintiff must allege an "injury in fact, " that is, one that is immediate and palpable, choate and concrete; not one which is speculative, abstract, potential, or hypothetical. Public Service Comm. v. Wycoff Co., 344 U.S. 237-243-4 (1952); United Public Workers v. Mitchell, 330 U.S. 75, 89-90 (1947); Maryland Casualty Co. v. Pacific Oil and Coal Co., 312 U.S. 270, 273 (1941); Lujan v. Defenders of Wildlife, _____ U.S. _____,

112 S. Ct. 2130, 2136, 119 L.Ed.2d 351 (1992); Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464, 472-4, 102 S. Ct. 752, 70 L.Ed.2d 700 (1982).

2. The very use of the terms "case or controversy" implies that the dispute must be real, not hypothetical, and that the plaintiff must be personally affected and thus have standing to sue. KVUE, Inc. v. Austin Broadcasting Corp., 709 F.2d 922 (5th Cir. 1983). In this case, Plaintiff presented only hypothetical and speculative matters. Under such circumstances, no jurisdiction over Plaintiff's complaint is conferred upon this Court.

3. Plaintiff does not allege a cause of action under 42 U.S.C. § 1983. The threshold question in a § 1983 cause of action is whether the act complained of rises to the level of a deprivation of rights that the Fourteenth Amendment was designed to protect. Siegert v. Gilley, 550 U.S. 226, 111 S.Ct. 1789, 114 L.Ed.2d 277 (1991). This is because the Fourteenth Amendment does not transform every act committed by a state actor into a constitutional violation. Deshaney v. Winnebago County Dept. of Soc. Serv., 489 U.S. 189, 202, 109 S.Ct. 998, 1007, 103 L.Ed.2d 249 (1989).

4. In the case of officials sued in their official capacities, those officials are not "persons" within the meaning of 42 U.S.C. § 1983, and cannot be sued for money damages under § 1983. Will v. Michigan Dept. of State Police, 491 U.S. 58, 109 S.Ct. 2304, 2309, N.6, 105 L.Ed.2d 45 (1989), citing Welsh v. Texas Dept. of Highway and Public Transportation, 483 U.S. 468, 107 S.Ct. 2941 97 L.Ed.2d 389 (1987); *Quern v.*

Jordan, 400 U.S. 332, 99 S.Ct. 1139 55 L.Ed.2d 494 (1979). In the instant case, it is impossible to determine from Plain-tiff's very generalized pleadings whether any action of any Defendant rises to the level of a question cognizable under § 1983.

5. To the extent that the State officials are sued in their individual capacities, such officials also have qualified immunity. State officials cannot be held liable for violations of federal law unless their conduct violates "clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800 at 822, 102 S.Ct. 2727 at 2738, 73 L.Ed.376 (1982). For those actions which may fall outside the scope of questions involving judgment and the exercise of discretion, plaintiffs are required to specifically allege that individual defendants violated clearly established law or else be subject to dismissal for failure to state a claim upon which relief can be granted. Mitchell v. Forsyth, 472 U.S. 511, 105 S.Ct. 2815, 86 L.Ed.2d 411, 425 (1985).

6. State official's qualified immunity affords protection not only from ultimate liability, but also from the burden and expense of pretrial discovery. Qualified immunity is an "immunity from suit rather than a mere defense to liability," Mitchell v. Forsytth, 472 U.S. 511, 105 S.Ct. a t 2815, 86 L.Ed.2d 411 (1985). The very purpose of the Harlow objective standard is to "permit the resolution of many insubstantial claims on summary judgment." Harlow 457 U.S. at 818, 102 S.Ct. at 2738. It is the plaintiff's burden to overcome a defendant's qualified immunity. Burns-Toole v. Bryne, 11 F. 3d 1270 (5th Cir. 1994); Saldana v. Garza, 684 F.2d 1159, 1163 (5th Cir. 1982), cert. de-

nied, 460 U.S. 1012, 103 S.Ct. 1253 75 L.Ed.2d 481 (1983).

The cloaking of state actors with a qualified immunity is grounded in the belief that a government cannot operate efficiently if its employees and agents are subjected to the costly and time-consuming rigors of trial and discovery. Instead, state actors should be able to act freely, within the bounds prescribed by law, but without the fear of consequences. The absence of this immunity would, as Judge Learned Hand has said, "dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties."

Burns-Toole, Supra, 11 F.3d at 1273-4.

7. In order to overcome defendants' qualified immunity, plaintiffs must allege the violation of a clearly established constitutional right in combination with specific acts by defendants and the acts alleged must be such that an objectively reasonably official would have known then to be in violation of plaintiffs' rights. Harlow, supra 457 U.S. at 819, 102 S.Ct. at 2738; Burns-Toole, supra, 11 F.3d at 1274. The Supreme Court has instructed that resolution of immunity issues must be made by reference to specified conduct rather than by invocation of broad legal principles. Anderson v. Creighton, 483 U.S. 635, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987).

8. The burden of pleading is substantially higher when suit is brought against state officials; because qualified immunity cannot be overcome merely by normal allegations of culpable mental states. Qualified immunity shields all "but the plainly incompetent and

those who knowingly violate the law." Malley v. Briggs, 475 U.S. 335, 106 S.Ct. 1092, 1096, 89 L.Ed.2d 271 (1985). The immunity of a state official who has acted in an objectively reasonable manner cannot be defeated by an allegation of mere negligence or of malice. Malley, supra, 475 U.S. at 341, S.Ct. at 1096; Daniels v. Williams, 474 U.S. 327 106 S.Ct.662, 88 L.Ed.2d 1986.

9. The Fifth Circuit has addressed the heightened pleading requirement, explicitly:

> Once a complaint against a [state official] adequately raises the likely issue of immunity— qualified or absolute— the district court should on its own require of the plaintiff a detailed complaint alleging with particularity all material facts on which he contends he will establish his right to recover, which will include detailed facts supporting the contention that the plea of immunity cannot be sustained.

Elliot v. Perez, 751 F.2d 1472, 1482 (5th Cir. 1985).

10. In the case at hand, individual Defendants are entitled to qualified immunity since there are no factual allegations that would allow a trier of fact to find that these individual Defendants have violated any clearly established constitutional standards. Because of the foregoing, this Court respectfully recommend that Defendants' Motion to Dismiss be GRANTED and that Plaintiff's cause of action be **DISMISSED with prejudice**.

The Clerk shall send copies of this Report and Recommendation to the parties who have ten (10) days

from receipt thereof to file written objections hereto, pursuant to General order 80-5. Failure to file written objections within the prescribed time shall bar an aggrieved party from attacking the factual findings on appeal.

Done at Brownsville, Texas this 17h day of March, 1995.

Fidencio G. Garza, Jr.
United States Magistrate Judge

APPENDIX D
(Filed July 5, 1996)

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 95-40646

OSCAR SALINAS

Plaintiff - Appellant

v.

UNIVERSITY OF TEXAS - PAN AMERICAN; GLORIA LIND, In her individual capacity; Ernest Baca, In his individual and official capacity; LEE HAMILTON, Dr., In his individual and official capacity; CAROL RAUSCH BRADEN, In his individual and official capacity; ANTONIO VILLALOBOS, In his individual and official capacity; RUDOLPH GOMEZ, Dr., In his individual and official capacity; IRMA RODRIGUEZ, In his individual capacity; NORMA PEREZ, In her individual capacity, GARY MOUNCE, Dr., In his individual and official capacity; VALERIE JAMES-ALDRIDGE, Dr., In her individual and official capacity

Defendants - Appellees

Appeal from the United States District Court for the Southern District of Texas, McAllen

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ON PETITION FOR REHEARING
( )

Before Judges GARWOOD, SMITH and DENNIS, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the appellant's motion to file petition for rehearing out of time is GRANTED.

IT FURTHER ORDERED that the petition for rehearing filed in the above case is denied.

ENTERED FOR THE COURT

_____

UNITED STATES CIRCUIT JUDGE

APPENDIX E
(Filed Dec. 6, 1994)

(92-93:1050)

August 18, 1993

MEMO TO: VICE PRESIDENTS, DEANS, DIRECTORS AND DEPARTMENT CHAIRS

FROM: Esmeralda N. Guerra
EEO/AA Officer

Carol Rausch
Assistant to President

RE: SEXUAL HARASSMENT POLICY AND GUIDELINES FOR HANDLING ILLEGAL DISCRIMINATION COMPLAINTS

Sexual Harassment is against the law and we want to make every effort to insure that sexual harassment does not occur at the University of Texas-Pan American. To assist you in bringing our commitment of a sexual harassment-free environment to our employees and students. I have enclosed a copy of our policy, as well as guidelines to assist you in dealing immediately with sexual harassment complaints or any type of illegal discrimination complaint, should you receive one.

H.O.P. - SECTION 3

D. Sexual Harassment Policy

1. UT-Pan American condemns sexual harassment of the students, staff, and faulty at UT-Pan American. Any form of sexual harassment will be considered a serious matter to be dealt with accordingly.

2. Sexual harassment is defined as: Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when:

   a. Submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment or education, or

   b. Submission to or rejection of such conduct by an individual is used as the basis for academic or employment decisions affecting that individual, or

   c. Such conduct has the purpose or effect of substantially interfering with an individual's academic or professional performance or creating an intimidating, hostile, or offensive employment, educational, or living environment.

3. It is the policy of UT-Pan American that supervisors and faculty shall not enter into any type of romantic or sexual relationship with staff under their supervision or with students enrolled in their courses.

   Such relationships will be looked upon as potentially detrimental to the working and learning environment, considered inappropriate and unacceptable, and grounds for disciplinary action includ-

ing termination for all appropriate parties involved.

PLEASE BRING THIS POLICY TO THE ATTENTION OF ALL FACULTY AND STAFF UNDER YOUR SUPERVISION.

Attached for your review is a copy of the GUIDELINES FOR ADMINISTRATORS IN HANDLING COMPLAINTS.

This guide was developed to assist you when a complaint is brought to your attention. **ANY COMPLAINT OF SEXUAL HARASSMENT OR ILLEGAL DISCRIMINATION MUST BE DEALT WITH IMMEDIATELY.** If you feel uncomfortable in dealing with any complaint, you must either bring it to the attention of your supervisor or contact the dean of students or myself. We will be available to assist you.

SEXUAL HARASSMENT IS AGAINST THE LAW AND WE AT UT-PAN AMERICAN DO NOT WISH ANY FORM OF IT TO EXIST ON OUR CAMPUS. With your assistance and cooperation we can make sure we have a beneficial working and learning environment.

Atch

yp

GUIDELINES FOR ADMINISTRATORS

IN HANDLING

COMPLAINTS

Any inquiry or complaint, especially regarding sexual harassment, must be taken seriously and dealt with promptly and with sensitivity to parties involved. Liability for improper handling of cases can be individual as well as institutional.

I. DETERMINATION OF PROPER PERSON TO DEAL WITH COMPLAINT

Employees who believe they are sexually harassed or discriminated against should contact their division director/dean or the administrator at the next higher level or the Compliance Officer. Division directors/deans who are contacted directly may contact the Compliance Officer for assistance. Students who believe they are victims of sexual harassment or discrimination may contact the alleged offender's dean or the Dean of students for assistance.

II. HANDLING ACTUAL COMPLAINT

Listen carefully to the complaint, taking notes to the specific event. Go back over the information to make sure you have the facts. If the complaint is about sexual harassment give the complainant a copy of the policy on sexual harassment and ask if the complainant feels that this specific complaint is sexual harassment as defined by the policy. Explain that sexual harassment is against the law and is unacceptable behavior at the university.

Ask the complainant what specific relief or remedy he/she is seeking. The complainant may expect formal action or may desire only that the offensive behavior stop.

Explain that in order for the university to conduct any formal investigation, make a determination of actual

sexual harassment or discrimination, and if appropriate, take formal disciplinary action, the complaint must complete a written complaint (form attached).

Dissemination of information relating to the case should be limited, in order that the privacy of all individuals involved is safeguarded as fully as possible.

A. FORMAL COMPLAINTS

The complainant will complete and sign the official form or provide the same information on any piece of paper and submit it to the administrator.

Upon receipt of the signed statement of the complainant, the administrator will advise his/her vice president and the Dean of Students (if a student is involved) and the Compliance Officer.

A meeting will be arranged by the division director/dean with the accused. The Dean of Students or the Compliance Officer may be present.

At this meeting the accused will be advised of the complaint which has been filed against him/her and the name of the individual filing the complaint. A copy of the written complaint will be given to the allege offender.

The accused will be asked for his/her explanation of the event or events. He/she will be required to respond to the complaint in writing by a specified date. (A week is the maximum response deadline.)

Every effort should be made to protect the complainant from retaliatory action from individual named in the complaint. If the accused confesses to the behavior, he/she

will be told that the behavior is unacceptable and that discipline, to be determined by his/her director/dean will be taken. Written charges shall be prepared and policies and procedures for disciplinary action will be followed.

If the accused denies the behavior, then the administrator will initiate an investigation. In any event, the accused is required to respond to the complaint in writing by the specified date.

1. THE INVESTIGATION

The administrator will interview parties involved to hear testimony pertaining to the matter and to gather any pertinent information and evidence.

ALL PARTIES INTERVIEWED MUST BE ADVISED THAT THE INTERVIEW IS CONFIDENTIAL AND DISCUSSION OF THE MATTER MAY BE GROUNDS FOR DISCIPLINARY ACTION.

Upon completion of the investigation, the division director/dean, will make a recommendation to the appropriate vice president, regarding action to be taken.

2. RESOLUTION OF COMPLAINT

If the investigation reveals that the complaint is without merit, then the complainant may appeal in accordance with grievance procedures. If the investigation reveals sexual harassment or discrimination occurred, the disciplinary action shall be recommended. Appeals of disciplinary action will be handled in accordance with institutional policy and procedure.

Both the complainant and the accused shall receive in

writing the manner in which the complaint has been resolved. Copies shall also be sent to the appropriate vice president and the compliance officer.

B. INFORMAL COMPLAINT

If the complainant does not wish to put his/her complaint in writing, the university will take informal action.

COMPLAINANT SHOULD BE ADVISED TO TELL THE HARASSER THAT HIS/HER ACTIONS AND BEHAVIORS ARE OBJECTIONAL AND REQUEST HIM/HER TO STOP.

EXAMPLES OF SEXUAL HARASSMENT

Specific examples of sexual harassment of students include: sexual innuendos or jokes about a person's anatomy, attempts to kiss students. Leering or ogling of a student's body, verbal harassment or abuse, subtle pressure for sexual activity, unnecessary touching, patting or pinching, direct propositions, displays of derogatory images of women, inappropriate and offensive, but essentially sanction-free sexual advances, generalized sexist remarks or behavior, or sexual assault.

C. RETALIATION

Any attempt to penalize or retaliate against a person for filing a complaint of sexual harassment or discrimination will be treated as a separate and distinct, additional charge of sexual harassment or discrimination.

1. ATTEMPT OF RESOLUTION

The administrator may meet with all personnel in the department in which the accused works and review the sexual harassment or discrimination policy. Or the supervisor may advise the individual that a verbal complaint of sexual harassment or discrimination has been made. The supervisor will explain to the alleged offender that the matter will be handled informally and confidentially. The supervisor may review the policy, describe examples of sexual harassment or discrimination and advise the individual to examine his/her behavior, cautioning him/her to be sure that the behavior is not a violation of policy. The administrator will not allege guilt or innocence of the individual.

APPENDIX F
(Filed March 6, 1995)

FACULTY
POLICY MANUAL

FACULTY GRIEVANCE

A. Purpose

This document is intended to provide a method for resolving faculty grievances in a timely, efficient and equitable manner, without prejudice, discrimination, or malice toward the person or persons initiating the action.

B. Scope of Grievance Policy

These policies and procedures are available to all faculty to present complaints related to wages, hours of work, working conditions, performance evaluations, merit raises, job assignments, reprimands or the interpretation or application of a rule, regulation or policy and such complaints shall not be processed through Discipline and Dismissal Appeal Procedure. Such complaints will be considered on an informal basis in order to allow prompt correction or explanation of the subject of the complaint.

1. Probationary Faculty Included
   The complaint of all faculty including probationary faculty will be considered pursuant to the procedure provided below.

2. Retaliation Prohibited

   No faculty will be penalized, disciplined or preju-

diced for exercising the right to make a complaint or for aiding another faculty in the presentation of that complaint.

C. Procedure for Bringing a Grievance

1. The faculty shall informally present the complaint to his or her supervisor or administrative equivalent for discussion, consideration and resolution within (5) working days from the date of the action which is subject of the complaint.

2. If the complaint is not satisfactorily resolved by the supervisor or administrative equivalent within (5) working days the faculty may present the complaint in writing to the appropriate department head or administrative equivalent for consideration and action. A written decision will be mailed to the employee within five (5) working days of receipt of the complaint.

3. If the faculty is not satisfied with the decision of the department head or administrative equivalent a written appeal stating why the appealed decision is incorrect may be made to the appropriate dean, director or administrative equivalent for the faculty department within five (5) working days of the date of the appealed decision. Within ten (10) working days of the date of the appeal a written decision will be mailed to the faculty.

4. Complaints not satisfactorily resolved by the dean, director or administrative equivalent may be appealed in writing to the appropriate vice president or administrative equivalent for the faculty department within five (5) working days of the date of

the appealed decision. The appeal shall state why the appealed decision is not correct. Within a reasonable time, not to exceed thirty (30) days following receipt of the appeal, a written decision shall be mailed to the faculty. This decision is final.

5. The written complaint and all decisions or responses regarding such complaint shall be a part of the personnel file of the faculty.

D. Review

This policy shall be reviewed by the Vice President for Academic Affairs in the Fall Semester of each academic year in consultation with the Faculty Senate.

APPENDIX G
(Filed Dec. 6, 1994)

To: Dr. Rudolph Gomez

From: Ernest J. Baca, Jr.

Date: August 24, 1993

Re: Formal Complaint of Gloria M. Lind against Oscar Salinas

Gloria M. Lind's complaint against Mr. Oscar Salinas has been forwarded to my office. I have reviewed the material and the substance of the complaint and after discussing this matter with Mr. Salinas, I am recommending that he be served with a formal warning. The substance of this warning which will be placed in Mr. Salinas' personnel file is as follows.

1. Mr. Salinas is not to contact Gloria Lind for any reason. If any business situation arises involving Mrs. Lind, the English Department chair will handle these situations. Any violation of this condition will constitute reason to immediately initiate dismissal proceedings.

2. There appears to be no evidence of Oscar Salinas' claim that Mrs. Lind has tampered with his apartment or that she has in any way attempted to contact or bother him. Mr. Salinas' response to her charges also seems to indicate that he has been overcome by the desire to contact her. If his beliefs or desires persist, I recommend that he seek

counseling in order to avoid aggravating this situation and pulling himself in the position of facing dismissal.

Mrs. Lind has the right to expect a good working environment, and Mr. Salinas' actions have created an atmosphere which is contrary to this exception.

C: Carol Rausch
Dr. Hamilton
Mr. Oscar Salinas

APPENDIX H
(Dec. 6, 1994)

September 30, 1993

Mr. Oscar Salinas
Lecturer, Department of English
University of Texas-Pan American
Edinburg, Texas 78539

Dear Mr. Salinas:

This follows my recommendation regarding the complaint that Gloria Lind filed against you. You received the copy of the memorandum of my recommendation with reference to this matter. Dr. Gomez has accepted my recommendation that you be given a formal warning which will become a part of your permanent file. The substance of this warning is as follows.

Please be advised that you are not to contact Gloria Lind in any way shape or form at either her business or home address or during chance encounters over which you may have no control or previous knowledge. The prohibition is to be permanent for as long as you are employed by the University of Texas-Pan American.

If for any reason you need to conduct official business with Gloria Lind's office, all such business shall be conducted by your Department Chair or his/her designate. Under no circumstances are you to contact Gloria Lind for the duration of your employment at the University of Texas-Pan American.

If you do not comply with the terms of this warning, you will be subject to immediate dismissal.

In addition to this warning, I am again suggesting that you consider obtaining professional counseling in order to assist you in resolving this matter.

Sincerely,

Ernest J. Baca, Jr.
Dean, College of Arts and Sciences.

c: Carol Rausch

APPENDIX I
(Filed Dec. 6th, 1994)

One year ago, July 1992, I, Gloria M. Lind, filed a complaint with the UT-Pan American Personnel Director, Mr. Tony Villalobos, about an employee, Mr. Oscar Salinas, harassing me. It all started when Mr. Salinas came to my office for a business trip he was taking which I was arranging for him. After he was in my office Mr. Salinas began calling me at work for non professional reasons. The first time he called, started as a business call, but than he turned the conversation around he told me he admired me and thought I was an attractive woman and that he would really like to go out with me. He said I have the most luscious lips and he would like to touch them. I advised him right away that I was not interested and that I am married and have children. He said that he knew that I was married but he just wanted to spend time with me. I gave Mr. Salinas no encouragement that I was interested in him and advised him that the only relationship I had with him would be strictly professional. Mr. Salinas called several times within a matter of months after this requesting me to spend time with him. He asked me to have dinner and breakfast with him several times and I kept telling him that I was not interested and to please stop. One morning, he called me at work, and asked me if I liked pancakes because he was making some and would like me to come over to his place to have some with him. I told him again no and that I was not interested. He said what would the harm be if we just ate together or had coffee together. I advised him that there would be harm because I was not that "type" of woman and I am very happily married. He said he knew that I was not that type of woman, but what would a cup of coffee hurt. He told me how his life was so unhappy, unfulfilled and that I did not understand. I asked him

what this had to do with business and again, I told him that I would only talk to him on a professional basis. He sighed a lot and said that he would have to go on with his life the way it was, unhappy. One occasion, Mr. Salinas called and asked me where I did my shopping and what time I go to places so that he could go and meet me at these places just so he could spend time with me. He asked if he could just walk down the aisles with me while I shop. I asked Mr. Salinas to please stop and that nothing was ever going to happen between the two of us. On another occasion which he called me, starting off as a business call, then he told me that he valued my opinion and asked me different questions about his life in general. I told him how could he value my opinion when he does not even know me, it did not make sense and he admitted to me that he called to just talk to me. That is when I filed a complaint with my supervisor and the Personnel Director. The Personnel Director and the Assistant to the President called Mr. Salinas in and advised him that what he was doing was disturbing me. *He was then advised to stop contact with me and to call SATO for his travel arrangements.* [italics added] He said that he would stop, and that he did not realize what he was doing. About one week after Mr. Salinas was called in, he called me again and wanted me to know that he was not mad at me for what I had done, and he could understand why I did it. He sighed a lot and said that I did not understand and that he would go on with his life the way it was. I assumed that everything had ended because I had not heard from him, until June 1993. He called me and asked if I had it in for him? I told him that I did not know what he was talking about. He said that there was a woman that looks exactly like me who was leaving notes on his door at his apartment. I told him that I did not know where he lives, nor did I care to know. He seemed to be very troubled on the phone when he was talking to me. He

kept insisting that it was me leaving the notes. Our conversation was short. I told him I was busy and I had to go. One week later he called again and I was on the phone. The department secretary recognized his voice on the phone and asked if this had something to do with travel reservations because he should call SATO to make his reservations and he said no that he would just call me back. As far as my knowledge, he has not called back. On Tuesday afternoon, August 03, 1993, Mr. Salinas came into my office and asked me if I could talk to him. I advised that I was extremely busy working on bids. He said that it would only take a minute. He asked me, "How long have I been a vamp?" I told him that I did not understand. He asked again, and I repeated myself. I asked him what was he trying to ask me. He then asked me, "How many mens lives have I ruined? Weird things are happening to me. Somebody broke into my apartment and stole a handkerchief. I know that it is you doing it. You know everything about me and I know nothing about you. I am scared." I told him I knew nothing about it and what made him think that I had anything to do with the situation and I advised him of this from the beginning. I reinforced that I don't know anything about him nor his life and said good bye. He walked out of my office.

Gloria M.Lind
August 04, 1993

APPENDIX J
(Filed Dec. 6th, 1994)

March 21, 1994

Mr. Tony Villalobos
Director of Personnel
University of Texas-Pan American
Edinburg, Texas 78539

Dear Mr. Villalobos:

Enclosed is a copy of a letter that I wrote to Ms. Rausch Braden asking for clarification of certain points regarding her investigation into Mrs. Gloria Lind's allegation that I sexually harassed her. You will note that the first point has to do with just exactly what Mrs. Lind initially reported to her supervisor, Ms. Rios, who then reported to you. In July of 1992, you told me that Mr. Lind had informed Ms. Rios of my calls simply because "she thought (Ms. Rios) should know." The implication is that though she might have found my calls morally objectionably (this sounds like the case, I am not saying it was the case), she did not find my behavior especially hard to deal with, as in fact it was not, as she knew that I would not call again once she said not to. You also told me that Mrs. Lind said I could go to her office to discuss business but anything personal. At this time, I declined to present my side of the story, as there was no formal complaint and I had no wish to inveigh against Mrs. Lind. Generally, the tone of the meeting was informal, and you and Ms. Rausch said you were talking to me because you had to cover your responsibilities. As you know, much has ensued since then, but I would appreciate it if you would consider the past objectively as I ask you for explicit confirmation your initial remarks to me.

In her formal complaint to the university, Mrs. Lind gives a different description of the events. I wrote to Ms. Rausch Braden simply asking her to include Mrs. Lind's initial remarks in the record, a very important thing to do as Mrs. Lind's complaint alleges that I had been told to avoid conducting business with her, thereby giving the impression that I really had harassed her. In her reply (enclosed), Ms. Rausch Braden does not bother to complete the record of statements by addressing my point. I regard this as tacit confirmation of my description of events, but tacit confirmation may not seem convincing to a grievance committee or jury, so I am forced to investigate on my own. There are five people beside Mrs. Lind and myself who are aware of Mrs. Lind's initial statements: Ms. Rausch Braden, Ms. Rios, Dr. Baca, Dr. Hamilton, and yourself. I would appreciate it very much if you would simply send me a brief statement of your initial description to me of the substance of Mrs. Lind's initial statements. I do not want you to be in the dark about why I am bringing this up now, so I am enclosing copies of relevant documents.

Sincerely,
Oscar Salinas

Memorandum

To: Mr. Oscar Salinas

From: Antonio Villalobos, Personnel Director

Date: March 23, 1994

Subject: Response to March 21, 1994 Correspondence

In brief, Mrs. Gloria Lind's initial statements to me were in substance an expression of extreme concern about what she considered inappropriate behavior on your part (i.e., flirtations) and language that made her uncomfortable. She was particularly concerned that her polite objections did not deter you. She therefore wanted management Ms. Rios, to be aware of the situation in case it became more serious. When asked if she wanted to file a formal complaint, she responded that all she wanted was that the inappropriate behavior stop. Subsequently, Ms. Rausch Braden and I met informally with you. The primary purpose of that meeting was to convey to you, in the context of our official capacity, that your behavior toward Ms. Lind was considered by her to be both offensive and unwelcomed. Without questioning motives or delving into the events which lead to the meeting, you were duly informed. Additionally, we discussed the definition of sexual harassment to assure a clear understanding as to what constitutes sexual harassment and to underscore the seriousness of such matters.

Although I agree that the tone of our initial meeting with you was informal and that it was certainly within the purview both Ms. Rausch Braden's and my responsibilities, I wish make it clear that it was not called to cover our responsibilities as you state in your letter (I am referring your statement: "...you and Ms. Rausch said you were talking to me because you had to cover your responsibilities"). The meeting was called to address a serious allegation in an appropriate manner as indicated above; nothing in the tone or content of that meeting should be construed otherwise. Given your reaction to our discussion, - you gave every indication that you would cease and desist - both Ms. Rausch Braden and I considered the matter adequately addressed at that time.

APPENDIX K
(Filed Dec. 6, 1994)

Transcript of Conversation with Lee Hamilton, 3/30/94

Lee: No — let me tell you what my understanding of it is. My understanding of that was that you could continue to do business with Gloria Lind for travel, but that you could not have personal contact, you could not go to that office, it had to be conducted over the phone.
Me: (garbled) ... on the phone...
Lee: That is where the troubled begins the second time. *You were conducting business with her over the phone.* The problem occurs when you go over there and confront her directly. That was the only prohibition because now the prohibition is you have no contact with her — that it must be done through intermediaries.
Me: And I'm saying that's a lie. Because when I — they told me there — I can recall when we talked in the summer that, uh, they had said, both of them, hey, you can go in there and conduct business with her, in the office, okay, and you said that Carol had gone ahead and confirmed that version of my story in my letter. That's the way I'm sure I remember it. *All you've gotta do is write me a letter and say that* — tell me what you've just said, I'll ...
Lee: You've already taped it. I don't have to tell you anything else. I'm telling you what my understanding of the first meeting was. The result of it was that you could continue to do business with her, but you could not have direct contact. Because, Oscar, that's what the problem is...
[garbled — both talking at once]
Me: That is not what you said in the fall before the semester began. Uh, is that all we're talking about?
Lee: No, that's not all we're talking about. Let's leave it

on.
Me: Let's leave it on.
Lee: *I am now telling you that you are not to go to Irma to have her do any of your work. Because you have brought her into this*, you've never said anything to me about it...
(garbled — both talking)Lee: Until — let me finish — until Carol called her in to discuss with her about what had happened. Now Irma's name had never been brought up, she'd never been questioned, she'd never had any involvement as far as I know, until only a few weeks ago. That's the first time even Carol knew, and Carol's been involved in this twice now — is that correct.
Me: *Yes, and I'm saying that's a lie.*

APPENDIX L
(Filed December 6, 1994)

April 16, 1994

Mr. Oscar Salinas
Lecturer
Department of English
University of Texas-Pan American

Dear Mr. Salinas:

This is response to your letter of April 6, 1994.

After reading your letter I can conclude that you don't understand the substance of my warning and the reason for my decision to serve you with a written warning. The written warning was based on Gloria Lind's complaint and your own written and oral account of what occurred during your meeting with Gloria Lind. She was upset by your persistent attempts to communicate with her on matters not related to the conduct of business. You admitted that these discussions had occurred. You ignored an earlier warning which prohibited you from *contacting her on any matters not related to the conduct of business*.[italics added] The instances which you have described in your letter of April 6, 1994 do not bear any relevance to the events that resulted in the written warning.

Finally, I want to set the record straight on another point which you mentioned in your letter. *You have mentioned the term ("Sexual Harassment") which I never used in my oral or written communication with you.* [italics added]

Sincerely,

Ernest J. Baca, Jr.
Dean

APPENDIX M
(Filed December 6, 1994)

March 3, 1994

Ms. Carol Rausch
Assistant to the President

Dear Ms. Rausch:

I am sure you have been made aware by Dr. Baca of a conversation I taped with my apartment manager which I contend is convincing evidence of invasion of privacy by her and Mrs. Lind. That evidence has prompted me to review the substance of the formal warning in my permanent file. I have to say that there does not appear to be any substance because there is no report of any investigation either in Dr. Baca's letter of warning to me or his August 23, 1993 memo to Dr. Gomez which makes note of lack of evidence of invasion of privacy. Dr. Hamilton tells me you sent security to question my apartment manager, so I assume you were in charge of the investigation. At this time, I need clarification of three points in particular.

First, in my August 4, 1993, response to Mrs. Lind's allegations of harassment, I claim that contrary to Mrs. Lind's August 4, 1993, assertion that in July of 1992 you and Mr. Villalobos told me I was to stop all business contact with her, I was instead informed that I could still go to the travel office and conduct business with her, as, according to Mr. Villalobos, she had mentioned my calls only "because she thought she [her supervisor, Ms. Rios] should know." The phrase leaves the impression that I was neither bothersome nor hard to deal with. In a conflict which comes down to one person's word against

another's, inconsistency between self-reports is noteworthy to say the least. In a meeting with Dr. Baca and Dr. Hamilton a week before Fall semester, Dr. Hamilton said you had confirmed that I had been told I could still conduct business with Mrs. Lind. Yet, this major discrepancy between Mrs. Lind's statements is never taken into account in any "investigation."

Second, at our August 1993 meeting (Dr. Glazer also present along with Mr. Villalobos), I mentioned that Mrs. Lind had many helpers. You asked for examples, and I mentioned one in particular, Ms. Irma Rodriguez, a secretary in the English department. I saw you write something down when I mentioned her name, so I assume you have her in your notes as it is significant information. Yet there is never any mention of Ms. Rodriguez being questioned as part of any investigation.

I need to be investigating the legality of a chemist pronouncing me in need of counseling especially on so little evidence, but for now, I need your first-hand report of your investigation, and I would appreciate it if you would include mention of whether you asked my apartment manager what she did with the letter I addressed to her and Mrs. Lind in which I told them to stop invading my privacy.

Sincerely,

Oscar Salinas

March 16, 1994

MEMO TO: Mr. Oscar Salinas

FROM: Carol Rausch Braden
Assistant to the President

RE: LETTER OF MARCH 3, 1994

In your letter of March 3, 1994, you are stating that there does not appear to be any substance for the formal warning placed in your personal file. I have included a copy of the *Handbook of Operating Procedures*, Section 7.4.8, which explains that you may add any written statement to your file if you believe that any of the material is not accurate, relevant, timely, or complete. In regard to the investigation, our police department interviewed Norma Perez, your apartment manager. *She advised us that she had found a letter addressed to Gloria Lind in her office, but since she did not know Gloria Lind, she threw it away.*[italics added]

Your letter mentions Irma Rodriguez. I do not recall receiving any names other than that of your apartment manager, however, I have interviewed Ms. Rodriguez since your March 3rd letter and she advises me that she rarely uses Mrs. Lind; that she met her once and that she rarely uses Mrs. Lind in making travel arrangements, but uses SATO directly.

In conclusion, the formal warning placed in your file was a disciplinary action taken based upon the entire record of material, including your own written statement. Please be advised that you are prohibited from any contact with Mrs. Lind. That prohibition still stands.

c: Dr. Rudolph Gomez
Dr. Ernest Baca
Dr. Lee Hamilton
Chief Howard Miller

dt

Excerpt from Pleadings filed August 22, 1994

[Denies] Paragraph No. 143 of said Petition wherein it is stated that Defendant had told the campus police department that she had thrown away the letter Plaintiff had written. Defendant also denies that in a letter from Plaintiff, was told to stop invading his privacy.

WHEREFORE, PREMISES, CONSIDERED, Defendant prays that upon final hearing hereof, Plaintiff take nothing and go hence with its costs without day and for general relief.

Respectfully Submitted
NORMA PEREZ, PRO SE
c/o Ash Tree Apartments
707 S. Sugar Road
Edinburg, Texas 78539

APPENDIX N
(Filed December 6, 1994)

May 2, 1994

Mr. Oscar Salinas, Lecturer
Department of English
University of Texas-Pan American
Edinburg, Texas 78539

Dear Mr. Salinas:

I have, one again, reviewed the record. I continue to concur with the memorandum that Dean Baca sent to you on September 30, 1993. (Copy attached).

I am repeating for emphasis two of Dr. Baca's statements which are still in effect: ". . .Under no circumstances are you to contact Gloria Lind for the duration of your employment at the University of Texas-Pan American."

"If you do not comply with the terms of this warning, you will be subject to immediate dismissal."

Sincerely,

Rudolph Gomez
Vice President for Academic Affairs

sm
Attachments

c: Ms. Carol Rausch Braden
Dr. Ernest J. Baca
Dr. Lee Hamilton

APPENDIX O

(Excerpt from Appellant's Original Brief mailed Nov. 22, 1995)

By Mr. Salinas: Your honor, I really beg to differ with the defense's contention that there isn't any conduct involved, that, one is not illegal, and two, doesn't hurt me. That letter was incredible damaging. And then —
The Court: That's not what he's talking about.
Mr. Salinas: Your honor, I —
The Court: Hey, this is my courtroom and you go by my rules. You listen to me. I'm asking you to respond to what he said.
Mr. Salinas: Your honor, I'm sorry.
The Court: I don't want you to get on a rabbit trail about what they did to you or this letter — I mean, right now, we're not at that point, Mr. Salinas. We're trying to see if you can stay in the ball game, right now. Can you understand what I'm telling you?
Mr. Salinas: Absolutely, Your Honor.
The Court: I don't care if you wrote two hundred pages. That would still not mean you were staying in the ball game. But, what I'm trying to do is keep you in the game. And, what he was saying — Did you hear what he said? You didn't even hear what he said.
Mr. Salinas: I heard it very well Your Honor.

Vol. I, pgs. 10-11, lines 6-25, 1-2

The point Plaintiff had to rebut was Mr. McGuffey's assertion that "there just isn't any conduct involved to Mr. Salinas' detriment that raises a question for this Court" (I, 9-10, 11.25, 1). At the beginning of his argument, after Plaintiff noted the letter of reprimand placed in his file, he was about to note the harassment that he has been subjected to, including theft and vandalism (I, 10, 1.9),

but the court rather agitatedly cut him off, saying "That's not what he's talking about" (I, 10, 1.10). Just a few seconds later, as Plaintiff tried to assure the court that he was merely stating his claim by referring to state conduct, the court, with considerable rancor and an unnecessarily subjugating tone, cut him off again: "Hey, this is my courtroom and you go by my rules (I, 10, 11.12-13). The "rules" seem to prohibit mention of anything concrete, but then in the same breath, the Magistrate Judge contradicts his warning against mention of conduct with the hectoring instruction, "You listen to me. I'm asking you to respond to what he said" (I, p.10, 11.13-14). However, in the next few seconds, as soon as Plaintiff indicates submissiveness — "Your Honor, I'm sorry" (I, 10, 1.15) — the court makes it clear that it does not welcome any references to Mr. McGuffey's point abut the absence of any injurious misconduct by Defendants by telling Plaintiff not "to get on a rabbit trail about what they did to you" (I, 10, 11.16-17).

APPENDIX P

a. Excerpt from transcript of November 7, 1994 hearing filed March 24, 1995:

The Court: . . . I've looked at the pleadings now, through all the pages and pages of them. And, it all boils down to a letter placed in your personnel file. That's what basically, if you focus on that, that's what you're talking about.

Now, if you go and look it that way, however, that, in itself, does not create a constitutional violation.

Did you hear what I said?

Mr. Salinas: Yes, your honor.

The Court: The placing of a letter in your personnel file does not constitute a constitutional violation.

(Vol. I, pg. 7, lines 14-24)

b. Excerpt from transcript of February 7, 1994 hearing filed March 24, 1995:

The Court: Why wouldn't they give him a hearing?

Mr. McGuffey: Procedures to formally request a hearing were not followed in accordance with —

The Court: Is it —

Mr. McGuffey: — the chapter and verse of their regulations.

The Court: Did you request — did you —

Mr. Salinas: Yes, I did. I went through the —

These are the procedures right here, your honor, faculty grievance.

The Court: Did you —

Mr. Salinas: I did all of this.

And if you'll notice, at the very end, it says that I should, the last person who I am to consult about my grievance is the Vice-President for Academic Affairs, the appropriate vice-president . . . .

Mr. McGuffey: There's not another procedure set up for a hearing after that determination.

(Vol. II, pgs. 14-15, lines 4-25, 1)